

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty
Order (APO) issued to TOLD Development
Company and Rochon Corporation (Co-
Permittees)

FINDINGS OF FACT, CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on January 27 and January 31, 1995 at the offices of the Minnesota Pollution Control Agency (Agency, MPCA) in St. Paul. The record in this matter closed on February 21, 1995, upon receipt by mail of Reply Briefs.

Dwight S. Wagenius and Eric J. Peck, Assistant Attorneys General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represented the MPCA. The Co-Permittees were represented by Jerry Braton, Vice President, Rochon Corporation, 12866 Highway 55, Plymouth, Minnesota 55441 and Ralph Robinson, Chairman, and Roger Dunekacke, Chief Financial Officer, TOLD Development Company, 6900 Wedgwood Road, Suite 100, Maple Grove, Minnesota 55311.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 116.072, subd. 6(e) the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least five days, and an opportunity has been afforded to each party adversely affected to comment on the recommendations. The Commissioner must consider such comments before issuing his final decision. Comments on this Report, if any, shall be filed with Charles W. Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

Whether the Co-Permittees violated provisions of the General Storm Water Discharge Permit issued to them on August 26, 1994, and, if so, whether the proposed nonforgivable penalty of \$7500 for such violations is reasonable.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On November 16, 1994, the MPCA issued an Administrative Penalty Order against the Co-Permittees in the amount \$9000. Of that total, \$1500 was forgivable and \$7500 was assessed as nonforgivable. The Co-Permittees filed a timely appeal and received an expedited hearing. The MPCA stipulated that since the issuance of the Administrative Penalty Order, the Co-Permittees have taken all appropriate corrective action and the Category B. (Forgivable) violations are forgiven.

2. The Administrative Penalty Order resulted from alleged violations of General Storm Water Discharge Permit No. MN R100000, issued to the Co-Permittees under the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit program on August 26, 1994. It is the first storm water discharge permit of its type issued by the Agency.

3. Three Category A. (Nonforgivable) violations of the permit form the basis of the APO. All involve the fact that the Co-Permittees “cleared and grubbed”^[1] a construction site, exposing soil at elevations above Miller Creek, a nearby protected trout stream, allegedly before installing appropriate pollution control measures around the site at an altitude below the exposed soil to protect the waters in the creek from sedimentary runoff. Miller Creek is one of only two urban-area trout streams protected by Minnesota Department of Natural Resources.

4. The construction site is located northeast of U.S. Highway 53 and southwest of Sundby Road near the Miller Hill Mall in Duluth. The site is approximately seven acres in area, located on a natural rise in the terrain between the two roadways. Miller Creek, a public water designated as a trout stream, flows generally northwest to southeast between the roadways at that point, on a course running northeast of the site and southwest of Sundby Road until it bends to the south, passing the site on the southeast, and leaves the site area through a culvert passing underneath Highway 53 (Ex. 2). Miller Creek is approximately ten miles long, rising in a wetland at higher altitude further north in the city, flowing on a course through a portion of the Duluth suburb of Hermantown, and then back into Duluth at a point upstream from the site. From the Highway 53 crossing, the creek flows generally south and west to the St. Louis Bay of Lake Superior, emptying out near 20th Avenue West. The site is approximately halfway between Miller Creek’s source and its mouth.

5. Under normal fall conditions, Miller Creek runs through a five to ten foot-wide channel bordered by steep banks in the area of the construction site. The natural grade on the southeast side, downstream from the bend noted in the preceding Finding, drops sharply over a 50-foot lateral distance. The area between the site and the creek is not as steep on the northeast side upstream from the bend. At a point north of the middle portion of the site, the natural grade drops quickly by approximately 15 to 20 feet but then is essentially flat for over 100 feet of linear distance before reaching the creek bank. At that point, the bank is bordered by a vegetative buffer and a two-foot high berm covered by natural vegetation.

6. TOLD Development, the site’s owner, and Rochon, the general contractor, were granted the permit in connection with building a department store (Kohl’s) and adjacent parking lot on the site. Before issuing the permit, because of the unique proximity of the site to a designated trout stream, the MPCA staff consulted with the South St. Louis Soil and Water Conservation District (SWCD) and the Minnesota Department of Natural Resources (DNR),

whose specialists reviewed the Co-Permittees' application with MPCA's staff prior to issuance of the permit.

7. The application process as laid out in the Permit requires the Co-Permittees to develop a Temporary Erosion and Sediment Control Plan "in accordance with Appendix A", as part of qualifying for the Permit. Part I.A.1. of the Permit specifies that the plan must be implemented as part of the project.

Part A of Appendix A specifies:

GOAL: The goal of the Temporary Erosion and Sediment Control Plan is to prevent sediment from entering waters of the state during construction. The owner shall incorporate Best Management Practices (BMPs) into the project's final plans and specifications, which are designed to meet this goal and comply with parts I.D. and I.E. of this permit. While the general requirements are identified in Parts I.D. and I.E. of this permit, it is the owner's responsibility to select the appropriate BMPs which satisfy these requirements.

8. Part I.D.2.a. of the Permit specifies:

Sediment Control

- a. Sediment control best management practices (BMPs), which prevent sediment from entering a water of the state, gutter, storm sewer inlet, ditch or other storm water conveyance system, shall be established on all down-gradient perimeters before any up-gradient land disturbing activities begin, and shall remain in place until final stabilization has been established.

"Best management practices (BMPs)" are defined in the Permit as:

"... Erosion and sediment control and water quality management practices that are the most effective and practicable means of controlling, preventing, and minimizing degradation of surface water, including construction-phasing, minimizing the length of time soil areas are exposed, prohibitions, and other management practices published by state or designated areawide planning agencies. . ."

These provisions, taken together with the goals of a Temporary Erosion and Sediment Control Plan as noted in the preceding Finding, require applicants to develop plans designed to prevent sediment from reaching waters of the state. The plans must incorporate BMPs that minimize soil exposure time and provide protection below before land-disturbing activities begin on higher ground.

9. The "Temporary Erosion and Sediment Control Plan" developed by the Co-Permittees (specifically by Toby Coenen and David Salo of Salo Engineering, Inc., a civil engineering firm retained for the Kohl's project) included a "Construction Sequence (CS)" listing the following order of activities:

1. Install perimeter silt fence, stabilized construction entrance and bale check dams in Miller Creek tributary drainage.
2. Construct phase 1 of detention pond including:

- Excavation of filter bed to rough grade,
 - Construction of berm embankment including gravel filter window,
 - Permanent turf establishment of disturbed soils on embankment and side slopes in accordance with restoration schedule on Sheet 3.
3. Install perimeter interceptor ditch and temporary culvert per temporary erosion control plan. Establish staging area.
 4. Install permanent storm sewer with inlet protection per standard plate on Sheet 3.
 5. Complete access road and culvert installation on creek in accordance with the separate construction sequence for the creek crossing.
 6. Begin site earthwork for building pad and begin remaining utility installation.
 7. Begin building construction. Runoff from building roof or floor slab shall be diverted through temporary drains away from exposed soils until permanent cover is established.
 8. Complete utility construction. Begin site earthwork for parking and access roads. Grade all areas to drain to temporary diversion ditches or permanent storm drains.
 9. Following site grading, immediately place geotextile fabric and Class 5 aggregate base over all exposed soils. If this work is to be delayed more than one week beyond completion of final grading, entire area to be stabilized per temporary turf restoration schedule on Sheet 3.
 10. After paving, construction phase 2 of detention pond including:
 - Remove sediment from sediment trap and gravel filter window,
 - Complete construction of berm embankment to final grades and sod areas disturbed in phase 2,
 - Installation of filter bed, underdrain and outlet structure,
 11. Remove all silt deposits from site and remove perimeter silt fencing and check dams upon final acceptance of MPCA.

MPCA staff and SWCD and DNR officials consulted by the staff interpreted the CS as providing for soil exposure only at steps 6-8, in a sequence that kept soil exposure to a minimum. They viewed steps 1-5 in the CS as establishing sediment control measures before the soil exposure involved in the next three steps. Specifically, the Co-Permittees were to install a perimeter silt fence (step 1), complete phase 1 construction of the detention pond (step 2), and install perimeter interceptor ditches (step 3) before they engaged in any up-gradient land disturbing activities. To these officials, the NPDES Permit required activity to be undertaken in the order specified in the CS created for the application by Salo Engineering.

10. The Co-Permittees interpreted the CS as a “guideline” only, did not view the Permit as requiring them to follow the CS in order, and cleared and grubbed the site after step 1 (a normal construction practice, in their view) before building the detention pond (step 2) or installing the interceptor ditch (step 3).

11. Construction commenced on the site on September 7, 1994. A perimeter silt fence was installed that day. Clearing and grubbing activity began on September 8 and continued through Monday, September 12 (three work days) before heavy rains prevented all work on the site for the balance of the week. September 19 was spent hauling the cleared and grubbed vegetation from the site. Construction began on the detention pond the following day, but rain and wet ground prevented further work on September 21-23 and September 26-28. September 29 and 30 were normal work days, but rain and wet ground prevented work on October 3 and 4. Work was performed on October 5 and 6, with the southeast-side interceptor ditch and detention pond completed by the latter day. Of the 22 potential work days between September 7 and October 6, twelve were rained out or too wet to work. The interceptor ditch and culvert planned on the west side of the site were never completed according to the plan drawn on Ex. 2, but the pollution control measures they were designed to perform were accomplished by other means. From October 7 through the end of October, rain or wet conditions wiped out another eleven potential work days (including two scheduled Saturdays).

12. The Co-Permittees cleared and grubbed the site for the department store and parking lot before commencing work on the sediment detention pond and southeast interceptor ditch in order to obtain fill to construct the ditch according to the plan shown in Exhibit 2. In order for water to flow through to the pond, the southeast-side ditch needed to be built at the appropriate slope down from a point four feet higher than the top of the detention pond. This physical reality required building up the starting point of the southeast ditch by nine feet, with appropriate reconstruction from natural grade to create a ditch that dropped one-eighth inch per linear foot. To accomplish this, the Co-Permittees had to "borrow" thousands of cubic yards of fill from the site above the ditch and pond. In order to get and move that much fill to where it was needed on the perimeter of the site, the whole site had to be cleared of all vegetation. Also, the cleared site had to be graded in order to allow runoff to flow properly to the ditch and pond. In its pre-construction condition, only about 10% of the site area drained that way.

13. The MPCA staff, in consultation with South St. Louis SWCD and Minnesota DNR officials, interpreted the phrase "site earthwork" as used at Steps 6 and 8 of the CS to be the "clearing and grubbing" activity contemplated in the process, which was actually performed right after installation of the perimeter silt fence (CS Step 1).

The staff maintains that the Permit would not have been issued if the CS had not been interpreted as they did, because otherwise the CS would violate the Permit by calling for up-gradient land disturbing activities (clearing and grubbing) to be performed before installation of sediment control BMPs (the pond and ditch) on the down-gradient perimeter. For their part, the Co-Permittees maintain that the MPCA, SWCD and DNR all understood clearly that clearing and grubbing had to take place prior to constructing the pond and ditch in order for the project to work.

14. Violation No. 3 of the APO reads:

"The Co-Permittees cleared and grubbed the whole site (CS #8) prior to completing and stabilizing the Miller Creek culvert crossing (CS #5). The Co-Permittees cleared and grubbed the Highway 53 side of Miller Creek crossing by September 9, 1994, but installed no erosion control measures adjacent to the creek until after September 20, 1994. On September 15, 1994, Miller Creek escaped its banks, entered the cleared area in the flood

plain where a relief culvert should have been placed, and where water pressure had knocked down and breached a portion of the silt fence.”

The Co-Permittees could not start the culvert work in the Miller Creek crossing area because they lacked a U.S. Army Corps of Engineers Permit to work in the wetland on the Sundby Road side of the creek until September 14, 1994. On and after September 15, the work was prevented by the Minnesota DNR because of prohibitions against disturbing a trout stream between that date and April 30, 1995.

In its Initial and Reply Briefs, the MPCA notes it is not basing any proposed penalty on the first and third sentences of Violation No. 3, which relate to culvert work on the Sundby Road side of the creek.

15. The second sentence of Violation 3 charges the Co-Permittees with out-of-sequence installation of “erosion control measures” on the Highway 53 (site) side of Miller Creek. Under Section D.1.b. of the Permit, the Co-Permittees had 21 days (the slope is flatter than 10:1 over that stretch) from the time of exposing soil (they had cleared at 50-foot wide vehicle path) within 100 feet of the creek to provide temporary protection or permanent cover. Protection and cover, in the form of a silt fence, vegetative mulch and seed cover and bale check dams, was constructed within 21 days of exposure of the soil.

In its Briefs, the MPCA argues that the violation was of Section I.D.2.a. of the Permit, the sediment control measure requiring appropriate BMPs on down-gradient perimeters before beginning up-gradient land disturbing activities. The Co-Permittees did not violate this portion of the Permit in connection with the Highway 53 side of the Miller Creek crossing because a vegetative buffer was left intact at the planned crossing area, and the land actually slopes up in the form of a two-foot high vegetation-covered berm over the last several linear feet before reaching the creek bank. By leaving the vegetation and berm intact, the Co-Permittees engaged in a “Best Management Practice” as defined in the Permit.

16. On several occasions between September 9 and October 6, 1994, various officials of the MPCA, SWCD and DNR visited the site to inspect the work and make suggestions regarding erosion control. They were drawn to the site initially after observing and receiving reports from persons interested in the construction that the upper portions of the site had been cleared of vegetation soon after work began. During the course of the site visits, personnel of the Co-Permittees and their subcontractors (such as Salo Engineering and Northland Constructors, the Duluth firm that cleared and grubbed the site and built the detention pond and interceptor ditch) treated the government officials with courtesy and were cooperative about making suggested changes.

17. John Thomas, a Water Quality Specialist at the MPCA’s Duluth office, apprised the Co-Permittees in writing on September 20, 1994 (Ex. 14) of the staff’s belief that the Permit had been violated in several particulars. Corrective actions were noted, and Thomas’s letter gave the Co-Permittees three working days to complete corrective action for Items (3) and (5), including completing the detention pond and interceptor ditch and providing protection or cover on the site side of the Miller Creek crossing. Thomas and Scott Smith, the Urban Conservationist for the South St. Louis SWCD, had apprised the Co-Permittees of these alleged violations orally on September 19. The problem areas noted in Items (3) and (5) of the September 20 letter are the same problems that form the basis of the three nonforgivable violations of the APO in contest here. Between September 21 and October 6, 1994, the day the detention pond and southeast-side

interceptor ditch were completed, adverse weather conditions prevented work on all days but September 29 and 30 and October 5 and 6 (Ex. 18).

18. On September 20, 1994, Mr. Robinson (of TOLD) wrote a letter inviting officials of the MPCA, SWCD, DNR, City of Duluth and the Corps of Engineers to weekly on-site meetings, beginning Thursday, September 22, to:

- Review our compliance with permit guidelines.
- Review job progress to date.
- Provide a format for the exchange of ideas and suggestions which may facilitate subsequent work.

The meetings were held on September 22, September 29, October 6, October 20, October 27, November 10 and November 17, 1994 (Ex. 12). Mr. Braton (of Rochon) prepared minutes to record discussions and agreements made at the meetings, which were distributed to all involved.

19. There is no evidence that sediment reached Miller Creek from the Kohl's Department Store and parking lot construction site at any time from the commencement of construction through the time of the hearing. Although the site was cleared before the detention pond and interceptor ditch were constructed, and heavy rains followed the clearing, causing massive amounts of mud to be exposed up-grade from the site perimeter and Miller Creek, the mud was contained and kept out of the creek by the perimeter silt fence and/or undisturbed natural vegetation at the edge of the creek.

20. Minn. Stat. § 116.072, subd. 2 authorizes the MPCA Commissioner to penalize the Co-Permittees up to \$10,000 for violations cited in the APO. Subdivision 2(b) provides:

(b) In determining the amount of a penalty the commissioner may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

The MPCA staff's recommended penalty of \$7500 was upheld by Assistant Commissioner Gordon E. Wegwart in issuing the APO. The staff arrived at the recommendation by interpreting only factors (1) and (2) of the above-quoted statute (willfulness and gravity of the violation). It considered taking factor (5) (economic benefit to the violators) into account, but rejected that consideration because of the difficulty and speculation involved in quantifying the perceived benefit (Ex. 24).¹²¹

21. In assessing the gravity of the violations, the staff used the Violations Matrix for calculating a base penalty provided in the Agency's Penalty Calculation Worksheet for

Administrative Penalty Orders (Ex. 30) and considered also the willfulness of the violations (Ex. 23). The matrix (Ex. 25) utilizes two factors—Potential for Harm (the vertical axis of the matrix) and Deviation from Compliance (the horizontal axis). Each axis has a “Minor” “Moderate” and “Serious” subrange. A discretionary range of monetary penalties, ranging from \$0 (the minimum for minor deviations from compliance with minor potential for harm) to \$10,000 (the maximum for serious deviation and serious potential) appears in each of the nine boxes of the matrix.

The staff assigned to recommend the penalty amount in this case met in a “forum” and determined that both the potential for harm and deviation from compliance were serious. The Serious-Serious box of the matrix prescribes a base penalty with a discretionary range of \$5000 to \$10,000. The forum reasoned that each axis (Potential and Deviation) accounted for \$5000 in maximum penalties. They recommended assessing the maximum of \$5000 for serious deviations from compliance but only half that (\$2500) for the Potential for Harm component because of the uncertainty of the level of harm, if any, to the fish population in Miller Creek. The Violations Matrix is attached as Appendix A.

22. The staff considered the deviation from compliance to be serious because it viewed clearing of the site and exposing of soil on higher ground before construction of the detention pond and interceptor ditch, and the exposing of soil near the proposed Miller Creek crossing, to be blatant violations of the Construction Sequence approved as part of the Permit. It also considered the fact that the Co-Permittees had been warned about the violations during early phases of construction and continued to violate the Permit after the written warnings and instructions issued by John Thomas on September 20, exhibiting what the staff viewed to be “unresponsive behavior regarding issues of concern” (Ex. 24). The preceding sentence reflects the apparent basis for the statement in the APO that “the Commissioner considered the willfulness of the violations”.

23. The staff considered the potential for harm to be serious because of the impact that would occur on Miller Creek, taking into account the creek’s protected status and the timing of the project during the time of the spawning season for brook trout. The staff assumed at the time it made the recommendation that Miller Creek was an “Outstanding Resource Value Water” (ORVW) of the state. That assumption was erroneous. Miller Creek is a “designated trout stream” (Minn. Rules 6262.0400, Subp. 4 PP.(55)), which qualifies it as a “public water” under Minn. Stat. § 103G.005. While ORVWs are those having “exceptional recreational value, or other special qualities which warrant stringent protection from pollution.”, (Minn. Rules 7050.0180, subp. 2A), the record does not specify the pollution control regulatory impact of the fact that Miller Creek is not so classified, but rather is classified as a type of “public water”. MPCA rules classify Miller Creek as a “trout water” (Minn. Rule 7050.0420) and specifies its water use classification at Minn. Rule 7050.0470, subp. 1.A(141) as 1B, 2A, 3B. Certain ORVWs are classified the same way.

24. Minn. Stat. § 116.072, subd. 6 requires an expedited hearing on administrative penalties to be held within thirty days after a request for such a hearing is filed the Commissioner of the Pollution Control Agency unless the parties agree to a later date. The hearing convened on January 27, ten days after the last day legally available to convene the hearing within the 30-day deadline following the Co-Permittees’ December 15 appeal. At the hearing, the parties stipulated that they had agreed to the later date for convening of the hearing.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57-14.62 and Minn. Stat. § 116.072.

2. Any Finding of Fact more properly termed a Conclusion is hereby adopted as such.

3. The Co-Permittees violated their Permit by clearing and grubbing the up-gradient portions of the construction site before installing a detention pond and interceptor ditch on the perimeter of the site to protect nearby Miller Creek from potential pollution. They have violated their Permit as noted in Category A. Violations 1 and 2 of the Administrative Penalty Order.

4. The Co-Permittees' violations of the Permit were not willful within the meaning of Minn. Stat. § 116.072, subd. 2(b)(1).

5. The Co-Permittees have not violated their Permit by installing no erosion control measures adjacent to the Highway 53 side of the Miller Creek crossing prior to clearing and grubbing of the site. It is appropriate to dismiss Category A. Violation 3 of the Administrative Penalty Order.

6. The Administrative Penalty Order did not charge the Co-Permittees with a violation for failure to install sediment control measures adjacent to the Highway 53 side of Miller Creek prior to clearing and grubbing the site. Even if it had, the Co-Permittees provided sediment control at the location by leaving intact a vegetative buffer and berm that protected the bank of the creek. For these reasons, and those noted in Conclusion 5, it is appropriate to dismiss Category A. Violation 3 of the Administrative Penalty Order.

7. The nonforgivable penalty assessed in the amount of \$7500 against the Co-Permittees is not reasonable within the meaning of Minn. Stat. § 116.072, subds. 2 and 6(c). Using the Agency's Violations Matrix (Ex. 25) to compute the appropriate penalty, the Potential for Harm is Serious and the Deviation from Compliance is Moderate in this case, which results in an appropriate base penalty range of \$3500 to \$8000. Within that range, a reasonable penalty is \$4000.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Minnesota Pollution Control Agency issue an ORDER AFFIRMING Category A. Violations 1 and 2 in the Administrative Penalty Order issued against the Co-Permittees on November 16, 1994 and DISMISSING Category A. Violation 3 of the Administrative Penalty Order; and

IT IS RECOMMENDED FURTHER: that the nonforgivable penalty of \$7500 contained in the Administrative Penalty Order issued to the Co-Permittees on November 16, 1994 be MODIFIED to reflect a penalty of \$4000.

Dated this 23rd day of March, 1995

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

The Administrative Law Judge concluded that the Co-Permittees violated their Permit because he interprets the Construction Sequence to call for the "clearing and grubbing" activity after construction of the detention pond and southwest-side interceptor ditch. In this connection, it is noted that the west-side interceptor ditch shown in the drawing on Ex. 2 was never built, but it appears the Agency regards that as immaterial in light of the fact that no ditch construction began until the up-gradient soil was exposed. The ALJ has assumed whatever was done on the west-side perimeter constitutes a Best Management Practice, but the problem is that it was installed too late in relation to the exposing of soil uphill from that point.

In agreeing with the MPCA on its interpretation of where "clearing and grubbing" belongs in the CS, the Judge accepts the words "site earthwork" to be synonymous with the "up-gradient land disturbing activities" forbidden under the Permit until BMPs were established on the down-gradient perimeters. Even if the Co-Permittees' argument that soil had to be exposed on the entire site in order to create BMPs such as interceptor ditches that would effectuate their purpose is accepted as valid from a common sense, "good construction practice" standpoint, it is clear that the government officials who reviewed the permit application would not have approved the project unless they believed the Co-Permittees intended to build the detention pond and water conveyance systems (interceptor ditch(es), culverts, and/or sewers) designed to direct runoff into the pond first.

Although witnesses for the Co-Permittees testified that it was clear to the MPCA, SWCD and DNR that clearing and grubbing had to take place before the pond and ditches could be built, and that the "site earthwork" noted at steps 6 and 8 of the CS refers only to minor grading work, the ALJ believes the MPCA, SWCD and DNR witnesses whose testimony essentially denies that. Specifically, the government witnesses made it clear that they believed the words "site earthwork" to refer to removal of vegetation from the site. If the Co-Permittees are right and it was clear to the government employees that "site earthwork" meant only minor grading of already-exposed soil, the MPCA and its consultants simply would not have approved the application, which, if the Co-Permittees' interpretation is correct, implied approval of violating

Part I.D.2.a. of the Permit by exposing all up-gradient soil on the site before constructing the detention pond and ditch(es). The Judge accepts the testimony of the government witnesses as credible on that point—if they knew the up-gradient soil exposure was to take place first, the Permit would not have been issued.

However, the Co-Permittees' position on this issue is not without merit. The Administrative Law Judge accepts the view that the on-site construction sequence, as carried out by Northland Constructors, was logical and in conformance with accepted construction industry practices. That is, the site had to be cleared to obtain a source of fill to build the water conveyance systems. He accepts also that the detention pond did not need to be built until the ditches or other water conveyancing systems were established. The problem is that none of that cures the fact that no Permit would have been issued if the MPCA did not interpret the Construction Sequence to call for construction of the pond and conveyancing systems before exposing soil on the up-gradient portion of the site. Nor does it address the elegantly simple problem that the Co-Permittees proceeded on the site in a different order than that provided in the Construction Sequence displayed on Ex. 2.

TOLD argues in its Reply Brief that the fact that the plans indicate no areas on which staged construction would be employed implies a tacit approval by the MPCA of clearing the site first. The ALJ cannot agree. It is clear that the application would not have been approved if the MPCA did not understand that construction of down-gradient BMPs came first.

Even looking at this situation in a light most favorable to the Co-Permittees, concluding that the parties simply did not communicate effectively to each other their interpretations of the CS and what they viewed as the order in which construction work would proceed, TOLD and Rochon must bear the responsibility for violating the text of their Permit by conducting up-gradient land disturbing activities before establishing down-gradient sediment control BMPs.

The above analysis applies to Nonforgivable Violations 1 and 2 in the Administrative Penalty Order. The ALJ has recommended dismissal of Nonforgivable Violation 3 because the APO charges the Co-Permittees with an erosion control violation (the evidence shows there was none) and it is improper to argue now that the Co-Permittees' activities on the Highway 53 side of Miller Creek violated the sediment control provisions of the Permit. In any event, the evidence shows that the Co-Permittees established appropriate sediment control BMPs on the Highway 53 side of the Miller Creek crossing so the merits of the sediment control issue are also in favor of TOLD and Rochon.

With respect to the issue of proper erosion controls, the ALJ accepts the Co-Permittees' argument that because the area used for a vehicle path below the building and parking lot site is essentially flat with a slope less than 10:1, the Co-Permittees had 21 days, under Section I.D.1. of the Permit, from the time of clearing to protect or cover the cleared area. While there is some dispute about when the protection or cover was installed, there is no dispute that it was done before 21 days after the path was cleared. In this connection, the Administrative Law Judge has accepted the Co-Permittees' evidence regarding the slope at that point being flatter than 10:1 as credible. Because the Co-Permittees installed erosion control measures in a timely fashion, they have not committed the violation specified in the second sentence of Violation 3, which the MPCA concedes in its Briefs is the only part of the originally-written Violation 3 it is pursuing.

Like the Co-Permittees, who have to live with the CS created on their behalf, the Agency must live with the fact that it has failed to establish a violation of the erosion control measures of the Permit (Section I.D.1.) by the Co-Permittees. Their after-the-fact argument that the Co-Permittees violated sediment control provisions of the Permit (Section I.D.2.) instead does not cure the fact that the Co-Permittees were never charged with such violations. Even had they been charged properly, the evidence shows the Co-Permittees committed no such violations at the Highway 53 side of the crossing area because they left intact a vegetation strip and vegetated berm of sufficient size to protect Miller Creek from sediment at that point. In so concluding, the ALJ accepts the Co-Permittees' testimony on that point, as testified to by Braton and Coenen, as credible. In addition, photographic evidence (Ex. 13) indicates the terrain leading to the creek on the Highway 53 side is flat between the upper portion of the site and the creek.

In concluding that the \$7500 penalty imposed in the APO is unreasonable, the Administrative Law Judge has concluded that the violations of the Permit by the Co-Permittees were not willful and that the gravity of the violations, both in terms of potential for harm and deviation from compliance are less serious than recommended to the Commissioner by the staff forum.

In so concluding, the Judge notes that the staff imputed an element of willfulness into its conclusion that the Co-Permittees' deviation from compliance was serious. The ALJ cannot agree that the Co-Permittees' actions were in willful disregard of Permit provisions. He believes that the CS was viewed by the Co-Permittees as allowing for clearing and grubbing of the site in connection with the building of the detention pond and interceptor ditch, and believes further that the Co-Permittees believed that such an "obvious" fact goes without saying to "anyone who knows anything about construction", as their witnesses argued at the hearing. That belief, although misplaced and falling short of relief in terms of whether the Permit was violated, is accepted by the ALJ as sincere. Also, the Co-Permittees were cooperative in making changes as soon as they could, given adverse weather conditions, and initiated weekly on-site meetings to improve communications. Given these facts, the ALJ is unable to conclude the violations were willful.

Because the violations are not willful and because only Violation 1 and 2 have been established, the Administrative Law Judge recommends downgrading the Deviation From Compliance axis on the Violations Matrix from Serious to Moderate. He agrees with the MPCA that the Potential for Harm level should remain at Serious because the close proximity of the site to a trout stream can lead to a devastating impact on the fish, especially when the construction activity takes place when the fish are spawning. The fact that Miller Creek is not an "Outstanding Resource Value Water" may be relevant to the appropriate level of the penalty, but the Judge still concludes that the Serious range on the Potential for Harm axis is appropriate. A penalty of \$4000, just above the minimum of \$3500 suggested for a "Serious Potential-Moderate Deviation" violation is recommended. The ALJ calculated it using the same methodology as suggested in the testimony of MPCA witness Voigt—each axis should count for half of the potential penalty. Therefore, given a range of \$3500 to \$8000 total, the ALJ assumed that Potential for Harm can range from \$1750 to \$4000 of the penalty. He selected \$1750, the lowest increment allowed, because Miller Creek is not an ORVW and the staff (according to Voigt's testimony) only recommended an increment of half of the potential \$5000 (it exercised its discretion within the "Serious-Serious" box of the matrix) for Potential for Harm because it was uncertain if any actual harm had been done. That uncertainty is shared by the ALJ, who notes

that half of the potential for harm component in the matrix box he recommends be considered is \$2000. He recommends dropping the Potential for Harm component another \$250 to \$1750, to recognize the fact that the staff forum incorrectly believed the Potential for Harm was to an Outstanding Resource Value Water. It is not known whether the level of protection would be greater if Miller Creek were so classified, but Ex. 24 makes it clear the forum believed the creek was an ORVW and that their belief influenced the level of recommended penalty.

In addition to recommending that the Deviation from Compliance portion of the penalty be “downgraded” to Moderate from Serious because the violations of the Permit were not willful, the Administrative Law Judge concludes further that a reduction in the maximum amount of \$4000 for the Deviation from Compliance component is appropriate. A reduction within the “Moderate Deviation-Serious Potential” box of the matrix recognizes that the Co-Permittees were able to complete construction of the detention pond and water-conveyancing devices such as the interceptor ditch within four working days of receiving the letter from MPCA’s John Thomas, just one day longer than specified in his letter. The fact that the actual compliance time was so much longer than four working days would have been under good working conditions, due to rain and wet grounds, should not be held against the Co-Permittees in this instance. The evidence shows they complied as soon as they could. As a result, a \$2250 penalty increment for the Deviation from Compliance axis of the matrix is recommended. When added to the \$1750 increment recommended for the Potential for Harm axis, a penalty of \$4000 results. The ALJ urges the Commissioner to accept that level of penalty as reasonable.

RCL

^[1] “Clearing and grubbing” is the process of removing vegetation from a land surface.

^[2] The Co-Permittees argued that, rather than benefiting from the way they proceeded with the project, they had to spend over their “pollution control budget” by \$16,000. This issue is immaterial, since the Agency based no part of the penalty on “economic benefit”, and the ALJ will not analyze it further.